Supreme Court, U.S.
FILED

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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

MARY E. ISBELL, DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL, JOSEPH ISBELL, THE STATE OF ARIZONA, MARICOPA COUNTY, THE CITY OF CHANDLER, and THE MARICOPA COUNTY SUPERIOR COURT,
Respondents.

Petition for a Writ of Certiorari to the Arizona Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

As part of its comprehensive regulatory scheme regarding highway and rail safety, Congress enacted 23 U.S.C. § 409, which prohibits the discovery of "reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadways, or railroad-highway crossings, pursuant to Sections 130, 144, and 152 of [Title 23 of the U.S. Code] or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds" in both state and federal courts, "notwithstanding any other provision of law." The question presented is:

Whether the Congressionally-mandated bar on discovery set forth in § 409 prevents discovery of information compiled by states and railroads for the purpose of identifying, evaluating, or planning the safety enhancements of crossings, including items such as vehicle traffic counts, field reviews of crossings and cost estimates for crossing improvements.

LIST OF PARTIES AND RULE 29.1 STATEMENT

Respondent Mary E. Isbell, plaintiff below, filed suit on her own behalf and on behalf of her children, Dennis, David, John, Marsha, and Joseph Isbell. The State of Arizona, Maricopa County, the City of Chandler, and Southern Pacific Transportation Company ("Southern Pacific") are defendants. The Maricopa County Superior Court was a nominal defendant in Southern Pacific's special action.

Pursuant to Rule 29.1, Southern Pacific discloses that its parent company is Southern Pacific Rail Corporation, and that Southern Pacific holds interests in the following subsidiaries (excluding wholly-owned subsidiaries):

Central California Traction Company
Harbor Belt Line Railroad
The Ogden Union Railway and Depot Company
Portland Terminal Railroad Company
Portland Traction Company
St. Louis Southwestern Railway Company
Southern Pacific Mexico, S.A. de C.V.
Sunset Railway Company
TTX Company
Denver Union Terminal Railway Company
The Alton & Southern Railway Company
Arkansas & Memphis Railway Bridge and Terminal Company
Kansas City Terminal Railway Company
Southern Illinois and Missouri Bridge Company
Terminal Railroad Association of St. Louis

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Petition for a Writ of Certiorari to the Arizona Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

Southern Pacific Transportation Company ("Southern Pacific") respectfully petitions for a writ of certiorari to review the opinion of the Arizona Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arizona Supreme Court (App. *infra*, 1a) is reported at 890 P.2d 611, and its supplemental opinion (App. *infra*, 10a) is reported at 893 P.2d 1297. The opinion of the Arizona Court of Appeals (App. *infra*, 19a) is reported at 863 P.2d 271. The minute entry order of the Arizona Superior Court (App. *infra*, 30a) is unreported.

JURISDICTION

The Arizona Supreme Court issued its opinion on March 2, 1995. Southern Pacific timely filed a motion for reconsideration on March 17, 1995. The Arizona Supreme Court issued its supplemental opinion on April 27, 1995, through which it rejected the motion for reconsideration, and it issued its mandate on June 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

23 U.S.C. § 409 provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadways, or railroad-highway crossings, pursuant to Sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

STATEMENT

This petition arises out of a railroad grade-crossing accident in which Richard Isbell died when his truck struck Southern Pacific's train. At issue is the applicability of § 409 which, by its terms, bars the discovery of information gathered for safety purposes.

A. The Background and Origin of § 409.

Section 409 is an integral part of Congress' pervasive and comprehensive regulation of rail and highway safety.

In order to understand the statute, it is necessary first to understand Congress' rail and highway safety programs.

1. ***The highway safety programs.***

The Federal Rail and Safety Act of 1970, 45 U.S.C. §§ 421-445 (FRSA), covers all areas of railroad safety. As part of the FRSA, Congress required the Secretary of Transportation to study and report to Congress on procedures to develop safer railroad crossings, 45 U.S.C. § 433(a), and to undertake "a coordinated effort towards the objective of developing and implementing solutions to the grade crossing problem . . . ." § 433(b).

In 1973, the Secretary filed the report mandated by § 433(a). Congress responded by amending § 130(d) of the Federal Highway Safety Act [1] so as to require the states, not the railroads, to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and implement a schedule of projects for this purpose." 23 U.S.C. § 130(d).

Other sections of the Federal Highway Safety Act also obligate the states to undertake programs aimed at improving highway safety, which encompasses crossing safety. For instance, 23 U.S.C. § 152(a) declares:

> Each state shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations . . . including . . . unmarked or poorly marked roads, which may constitute a danger to motorists and pedestrians, assign priorities for the correction of such locations . . . and establish and implement a schedule of projects for their improvement.

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[1] The Highway Safety Act applies directly to railroad grade crossings by virtue of its definition of the term "highway" to include ". . . railroad-highway crossings . . ." 23 U.S.C. § 101.

In addition, 23 U.S.C. § 402(a) requires each state to have a highway safety program approved by the Secretary, and conditions the states' continued receipt of Highway Safety Act funding upon compliance with such requirements.

The Secretary has promulgated two sets of regulations that require the states to assume jurisdiction over the question of whether and when to upgrade all railroad crossing warnings: 23 C.F.R. Part 646 (related to federal-aid highways), and 23 C.F.R. Part 924 (related to all other public roads). Section 646.216 sets forth procedures that states must follow in federally-funded grade crossing improvement projects, and § 924.9 sets forth multiple requirements and standards for the states' identification and elimination of hazardous grade crossings.

23 C.F.R. § 646.214(B) adopts the Manual on Uniform Traffic Control Devices (MUTCD) as the "national standard for all traffic control devices installed on any street, highway . . . open to the public travel . . ." 23 C.F.R. § 655.603(a). The MUTCD establishes the standard for railroad crossing improvements pursuant to 23 CF.R. § 646.214(B). Part VIII of the MUTCD is devoted to "traffic control systems for railroad-highway grade crossings" and specifically imposes on the states the responsibility for surveying and determining the need for upgrading the protection of all railroad crossings. Compliance with the MUTCD by the states is required under 23 C.F.R. § 655.603. Subsection (d) also requires the states to adopt a program which includes provisions for the systematic upgrading of substandard traffic control devices and for the installation of devices needed to achieve conformity with the MUTCD. In turn, 23 C.F.R. § 1204.4, Guideline 13(I)(D)(5) requires that the states "[a]nalyze potentially hazardous locations, such as . . . railroad grade crossings and develop appropriate countermeasures."

Arizona follows the federal requirements set forth above. *See, Arizona Revised Statutes* ("A.R.S.") §§ 40-

337 to 337.03. Among other things, these statutes require the Arizona Corporation Commission to establish "an array of such crossings where the installation of automatic signals or devices should be considered during the year, or within a reasonable time thereafter depending upon the availability of monies, materials, labor, and other factors involved in such installation." A.R.S. § 40-337.03. The State, in turn, requires the railroads to obtain and provide the data necessary to form the array and to evaluate the costs of updating particular crossings. *See, e.g.*, Arizona Administrative Rule 14-5-104(C)(10) ("When authorization for preliminary engineering and estimate or any federal-aid funding crossing improvement projects is submitted to the railroad, it shall be completed by the railroad and returned to the Arizona Department of Transportation within 60 days.")

This systematic, federally-mandated approach to highway safety improvements has been highly successful in saving lives. For example, the 1991 Annual Report on Highway Safety Improvement Programs, issued by the United States Department of Transportation, reports that, since 1974, the federal government funded more than 25,300 projects under the Rail-Highway Crossing Program (23 U.S.C. § 130) to reduce or eliminate hazards at railroad-highway crossings, resulting in the reduction of fatal, nonfatal injury, and combined fatal-plus-nonfatal injury accident rates by 38, 62, and 66 percent, respectively. *Id.* at IV-5. The Department of Transportation estimated that the Rail-Highway Crossing Program has saved over 6,400 lives and prevented 26,500 nonfatal injuries. *Ibid.* Similarly, since 1974, the Hazard Elimination Program (23 U.S.C. § 152), a second program, provided funds for more than 30,000 safety improvement projects, reducing fatal, nonfatal injury, and combined fatal-plus-nonfatal injury accident rates by 48, 24, and 25 percent, respectively. The Department of Transportation estimated that the Hazard Elimination Program prevented over 19,000 deaths and 520,000 nonfatal injuries. *Ibid.*

2. Section 409.

Section 409 was enacted as part of the Surface Transportation and Uniform Relocation Assistance Act of 1987. It explicitly bars discovery of "reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of . . . railroad-highway crossings . . .", "notwithstanding any other provision of law." Section 409 is an integral part of Congress' pervasive and comprehensive regulation of rail and highway safety. It specifically manifests Congress' intent to preclude the use of that regulation by private litigants for purposes which would defeat the broader interests of public safety promoted by the regulatory framework. Accordingly, courts have routinely held that § 409's purpose is to encourage candor and protect the decision-making process through which these federal programs are administered by protecting information. *E.g., Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992) ("the underlying intent of the statute is to facilitate candor . . . and to prohibit federally required record-keeping from being used as a tool . . . in private litigation"); *Harrison v. Burlington Northern R.R. Co.*, 965 F.2d 155, 156 n.3 (7th Cir. 1992) ("its purpose was to facilitate candor . . . or to keep the record-keeping required by federal provisions from providing an additional, virtually no-work tool for direct use in private litigation"); *Perkins v. Ohio Dep't of Transp.*, 584 N.E.2d 794, 802 (Ohio App. 1989) ("[T]he apparent purpose of this provision is to foster the free flow of safety-related information by precluding the possibility that such information later would be admissible in civil suits. The interest to be served by such legislation is to obtain information with regard to the safety of roadways free from the fear of future tort actions.").

Many courts have broadly construed § 409, prohibiting experts from considering protected materials and prohibiting the authors of such documents from testifying to their contents. For example, in *Robertson*, plaintiff was injured

in a car-train collision and offered at trial (1) a newspaper article that identified the crossing as the most dangerous one in the state, (2) the formula used by the state to evaluate the hazardousness of crossings, and (3) the state's automobile count at the crossing. The district court excluded this evidence under § 409, and the Eighth Circuit affirmed this exclusion on appeal. The Eighth Circuit found that the automobile count and formula were compiled to evaluate safety pursuant to federal law, rendering them protected and inadmissible, and found it immaterial that the information was also available for other purposes. The court also held that the newspaper article was inadmissible because it was prepared using the state's data, and that plaintiff's expert was properly precluded from using such information or data in forming his opinions.

B. Facts of the Instant Case and Proceedings Below.

In 1983, the State of Arizona placed the crossing at issue in its array for the installation of automatic gates in the indefinite future. Maricopa County applied to the Arizona Corporation Commission for permission to install the gates in 1985, and authority was granted in 1986 when the Corporation Commission authorized the installation of gates when labor and materials were available. No specific date was set for the installation of gates; and they were not yet installed in April, 1990, when the accident occurred.

Isbell sued the State, Southern Pacific, the City of Chandler, and Maricopa County, claiming, among other things, that they were negligent in failing to post additional warnings at the crossing, and in failing to install automatic gates at the crossing. Isbell served discovery requests on the State and Southern Pacific seeking, among other things, information regarding grade crossing improvement projects throughout Arizona, including numerous items compiled by Southern Pacific and the State pursuant to their statutory obligations. Specifically, Isbell

sought the date that the crossing first appeared on the array for the installation of gates; the date of any field reviews and engineering plans; the date and amount of Southern Pacific's cost estimates for improvements; the date that the Commission ordered the crossing to be improved, and the cost of the improvements; the date of meetings regarding the crossing; each letter regarding the crossing; written criteria for evaluating whether crossings merit automatic gates; Southern Pacific's evaluation of the crossing; the number of grade crossings in Arizona as of January 22, 1986 at which the Commission had entered an order granting a governmental entity authority to have Southern Pacific install automatic gates but at which the gates had not yet been installed, and information for each crossing, including the dates of orders; and the location of other Arizona grade crossings at which automatic gates were planned but not installed as of April 10, 1990, along with the dates of the orders.

Each of these discovery requests is improper under § 409 and Congress' comprehensive statutory scheme governing crossing improvements throughout the United States, under which the states, as well as the railroads, became obligated to compile a wide variety of statistical and other data regarding grade crossings. Accordingly, the State and Southern Pacific objected to this discovery under § 409. The trial court overruled the objections (App. at 33a-34a), the Arizona Court of Appeals reversed and upheld these objections (App. at 29a), and the Arizona Supreme Court reversed the Court of Appeals (App. at 9a), prompting this petition.

C. The Arizona Supreme Court's Decision.

The Arizona Supreme Court adopted a position that was not briefed or argued by any party or suggested by any of the reported cases construing § 409. Specifically, it held that § 409 only protects documents, and does not "protect facts within the personal knowledge of a party, unless that knowledge comes solely from the protected

document," despite the fact that § 409 expressly protects "data." 890 P.2d at 613 (App. at 5a). Then, it held that the terms "reports, surveys, schedules, lists and data" are "words of art," and that "the documents exempt from discovery and excluded from evidence under § 409 are precisely the documents described and prepared under the authority of [23 U.S.C.] §§ 130, 144, and 152, and not others." 890 P.2d at 614 (App. at 8a). Having so held, the Arizona Supreme Court refused to evaluate any of the specific interrogatories, stating that the record was insufficient in light of its interpretation of the statute.

REASONS FOR GRANTING THE PETITION

I. THE ARIZONA SUPREME COURT'S DECISION IS PLAINLY ERRONEOUS AND EVISCERATES THE PROTECTION CONGRESS ACCORDED THE STATES AND RAILROADS WHEN IT ENACTED § 409.

The Arizona Supreme Court's holding misreads the clear meaning of § 409 and is plainly incorrect for a number of reasons. First, the Arizona Supreme Court's ruling is plainly inconsistent with the express language of § 409. Section 409 explicitly protects reports, surveys, schedules, lists, and data *either* (1) if they were compiled pursuant to §§ 130, 144, and 152, *or* (2) if they were compiled *for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.* The underlined phrase belies the Arizona Supreme Court's suggestion that the words "reports, surveys, schedules, lists and data" are merely words of art defined in §§ 130, 144, and 152, because § 409 explicitly protects information generated *either* pursuant to §§ 130, 144, and 152 *or* for the purpose of developing other safety projects that may utilize federal funds; that is, the structure of § 409 dictates that those words also protect information generated outside of §§ 130, 144, and 152. By overlooking the underlined phrase, the Arizona Supreme Court's opinion

violates the rule that, "[i]n construing a statute, we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 99 S. Ct. 2326, 2331 (1979) (also holding that "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise").

Second, the Arizona Supreme Court's suggestion that the words "reports, surveys, schedules, lists [and] data" are words of art defined by §§ 130, 144, and 152 is not supported by those sections themselves. For example, the Arizona Supreme Court's suggestion that § 144(e) defines "data" as the government's inventory, classifications, and prioritizations for bridge projects (890 P.2d at 614, App. at 8a) finds no basis in § 144(e), which merely uses the word "data" in stating that the Secretary of Transportation shall allocate available funds for bridge work "based upon the lastest available data . . . ." Nothing in this phrase suggests that "data" means only documents prepared by the Secretary, or that "data" includes only reports, etc., generated under § 144's bridge repair program. Indeed, the federal government uses the word "data" to encompass other facts in 23 C.F.R. § 924.9(a)(1), which was enacted in 1983 (four years before § 409); that regulation requires the States to institute a program which will include "a process for collecting and maintaining a record of accident, traffic and highway *data*, including for railroad-highway grade crossings, the characteristics of both highway and train traffic." (Emphasis supplied.) Accordingly, when § 409 was enacted in 1987, federal regulations already classified the characteristics of highway and train traffic (e.g. traffic counts) as "data."

Third, the Arizona Supreme Court's reading of § 409 is inconsistent with well-settled principles of statutory construction. Two canons of statutory construction fatally undermine the Arizona Supreme Court's decision. One, courts must give Congress' words their ordinary

meaning. *Smith v. United States*, —— U.S. ——, 113 S. Ct. 2050, 2054 (1993). Two, courts must also interpret Congress' words in light of its purpose in enacting the statute. *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S. Ct. 986, 995 (1983). Section 409 protects, among other things, data compiled in connection with highway safety programs. "Data" is the plural form of "datum," and a "datum" is a fact. *The Compact Edition of the Oxford English Dictionary* (1971) Vol. I at 648. Indeed, Isbell's counsel, in making a contrary argument, conceded to the Arizona Court of Appeals that, "We're not reading the statute as it's written." 863 P.2d at 274 (App. at 23a). In addition to being entirely consistent with common usage, the use of "data" to mean "facts" is consistent with 23 C.F.R. § 924.9(a)(1), which, as noted above, lists highway and traffic counts as "data." Nothing in any rational definition of "data" suggests that only written data is protected, and Congress' purpose of fostering candor would be thwarted if the contents of protected documents could be obtained by deposing their authors, whose knowledge would, in the Arizona Supreme Court's view, be discoverable because they have personal knowledge that did not come solely from a protected document.

Similarly, and contrary to the Arizona Supreme Court's suggestion, "compiled" does not mean "originally compiled," nor does it mean "compiled solely for a specific purpose." In *Robertson*, the Eighth Circuit gave short shrift to this argument based on the plain language of § 409:

> Appellant's assertion that the formula and automobile count were admissible because such information was not collected or utilized solely for federal funding projects is without merit. Although such information was available for other uses and purposes, the statute's mandatory language requires exclusion of such evidence at trial.

954 F.2d at 1435 n.3. This holding is consistent with this Court's express determination that the term "com-

piled" does not mean "originally compiled," even under the restrictive construction of that term required by the Freedom of Information Act. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 110 S. Ct. 471, 476 (1989):

> The wording of the phrase under scrutiny is simple and direct: "compiled for law enforcement purposes." The plain words contain no requirement that compilation be effected at a specific time. The objects sought merely must have been "compiled" when the Government invokes the Exemption. A compilation, in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents. This definition seems readily to cover documents already collected by the Government originally for non-law-enforcement purposes. The Court of Appeals, however, throughout its opinion would have the word "compiled" mean "originally compiled." We disagree with that interpretation for, in our view, the plain meaning of the word "compile," or, for that matter, of its adjectival form "compiled," does not permit such refinement.

II. THE ARIZONA SUPREME COURT'S DECISION THREATENS THE DECISION-MAKING PROCESS THAT CONGRESS SOUGHT TO PROTECT AND THUS THREATENS CONGRESS' SAFETY PROGRAMS.

The issue raised by this petition is of grave importance. The Arizona Supreme Court's opinion strikes at the heart of Congress' safety improvement program (which covers all roadway hazards, not merely grade crossing hazards) by threatening the candor and the free flow of safety-related information that underlies the entire program and ensures that federal money will be spent prudently and where most needed. If reports and data concerning potential highway safety hazards are subject to discovery in tort actions, states and private parties will likely be deterred from compiling complete and accurate information about such hazards. As a result, federal highway safety

programs, which depend on information about safety problems supplied by the states and private entities such as railroads, will be jeopardized. Congress itself has recognized the dangers inherent in allowing the discovery of protected information; in response to some early cases suggesting that § 409 did not prohibit discovery of the protected information, but only its admissibility at trial, Congress amended § 409 in 1991 to make clear that it applies equally to the discovery of protected information.

III. THE ARIZONA SUPREME COURT'S DECISION CANNOT BE RECONCILED WITH OTHER DECISIONS, INCLUDING CONTROLLING AND DIRECTLY CONTRARY HOLDINGS BY THE EIGHTH CIRCUIT.

The Arizona Supreme Court's opinion cannot be reconciled with *Lusby v. Union Pacific R. Co.*, 4 F.3d 639 (8th Cir. 1993), *Robertson, supra*, *Miller v. Bailey*, 621 So. 2d 1174 (La. App. 1993), *Hagerty v. Southern Ry. Co.*, 133 F.R.D. 34 (E.D. Mo. 1990), or *Claspill v. Missouri Pacific R. Co.*, 793 S.W.2d 139 (Mo. 1990). *Lusby* expressly holds that vehicle counts, train traffic counts, and information regarding earlier accidents at a crossing are protected data under § 409, even if that information was not compiled solely for federal purposes and even if that information is available for other purposes. As noted above, *Robertson* holds that traffic counts and the state's formula for evaluating the hazardousness of crossings are protected under § 409 even if that information is also available for other purposes. *Miller* holds that § 409 protects a state trooper's letter to the Department of Transportation which indicates that "no parking" signs are needed on a highway. *Hagerty* holds that *railroad* documents, including letters, correspondence, and internal memoranda related to proposed, considered, or undertaken improvements, are protected under § 409.[2]

[2] Section 409 was amended in 1991 to clarify that it barred discovery of information; prior to that time, the caselaw split on

Claspill prohibits the use of a field inspection form proposing the addition of flashing lights at a railroad crossing, as well as testimony identifying and explaining a list of the most dangerous railroad crossings in the state. This conflict between the Arizona Supreme Court, the Eighth Circuit Court of Appeals, and various other courts, coupled with the importance of the issues, warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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whether § 409 applied to discovery issues. *Hagerty* followed the line of cases holding that § 409 did not affect discovery, but did preclude the use of the railroad documents at trial.